LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 2 19
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF ST. REGIS PAPER COMPANY FOR REHEARING

HORACE R. LAMB,
Attorney for Petitioner,
One Chase Manhattan Plaza,
New York 5, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF ST. REGIS PAPER COMPANY FOR REHEARING

Petitioner respectfully petitions for rehearing of this review on the following grounds:

First

The majority opinion by Mr. Justice Clark has overlooked or failed to consider an important provision in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§1001-1011 (1952), particularly §6(c), 5 U.S.C. §1005(c). It was pursuant to that section that the District Court entered an order and judgment directing petitioner to "comply with and respond to" specific "questions" set out in the 9 separate orders issued by the Federal Trade Commission (R. 210 and 213-216).

The majority opinion expressly "agree(d)" with the trial court and the Court of Appeals that although the Commission's orders were not "subpoenas", they were "similar process or demand(s)" within the language of

Section 6(c), and held that the District Court was empowered thereunder to order partial compliance with the Commission's orders. However, the opinion completely overlooked the fact that because the Commission's "orders" were such "similar process or demand", the penalty provision of Section 6(c) is controlling.

The oversight on the part of this Court is shown in the portion of the majority opinion reading as follows (pp. 15-16):

> "We agree with the trial court and the Court of Appeals that §6(c) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. §1005(c), authorized the procedure the court followed, i.e., ordering partial compliance. That section directs the court to sustain 'any such subpoena or similar process or demand to the extent that it is found to be in accordance with law . . . [sic].' Nor do we see any substance to the further contention that in directing partial compliance the trial judge treated those items found enforceable as subpoenas and therefore subject solely to contempt action."

If the sentence which is only quoted in part had been completed, the majority of the Court would have found "substance" in petitioner's contention regarding the determinations of the trial judge and the consequences thereof, namely, that the only penalty is punishment for contempt of the order and judgment of the District Court.

Section 6(c) provides:

> "(c) Subpenas. Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law *and, in any pro-*

> *ceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.*" (Emphasis added.)

The Commission's orders being "similar process or demand" within the meaning of §6(c) for the purpose of the partial enforcement provision, it necessarily follows that both the partial enforcement as well as the penalty provisions of §6(c) must apply. The Court could not, we submit, select one part of a sentence in §6(c) which defines the legal grounds for enforcement and disregard the conjunctive statutory direction regarding the punishment.

Except for the District Court's holding that the Commission's orders were "similar process or demand" within the meaning of §6(c), the District Court would have been without power to require partial compliance. There can be no doubt that the action in the District Court was "a proceeding for enforcement"; that the Commission's orders were "contest(ed)" in the District Court and that they were partially enforced pursuant to §6(c).[1] The

---

[1] The majority opinion states in a subsequent sentence of its opinion (p. 16) that the District Court's orders are "not in substitution of the Commission's orders but merely an enforcement of them, in accordance with §9 of the F.T.C.A. authorizing the court to compel obedience to lawful Commission orders." Section 9 of the F.T.C. Act confers upon the District Courts jurisdiction "to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act, or any order of the commission made in pursuance thereof." (38 Stat. 722, 15 U.S.C. §49). That relief was demanded in "Count One" of the complaint (R. 1-5), but such relief was denied by the District Court (R. 210). In the language quoted at page 2, *supra*, the majority "agree(d)" that the District Court did not grant mandamus or a mandatory injunction, but, on the contrary, exercised powers under §6(c) of the Administrative Procedure Act, *supra*. Presumably, this inconsistency led to the mistake in holding that under §10 of the F.T.C. Act penalties accrued.

The majority opinion (at p. 12) also states that under the F.T.C. Act (15 U.S.C. §§41-58) the only penalty against a corporation is the

order of enforcement requiring the "production of the • • • data within a reasonable time" was necessarily "under penalty of punishment for contempt in case of contumacious failure to comply."

The majority opinion in affirming the judgment of the Court of Appeals leaves in effect the holding (285 F. 2d 607, 616):

> "Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior non-compliance."

That, we respectfully submit, is the exact opposite of what Congress intended in enacting §6(c) of the Adminis-

---

$100 per day forfeiture for failure to file a "report"; that an individual, on the other hand, is subject to a fine of $1,000 to $5,000 or imprisonment of not more than one year, or both, for failure "to answer any lawful inquiry or produce documents", and that unless the Commission's orders require "reports", petitioner, a corporation, would not be subject to any penalty. The majority opinion concludes: "We cannot attribute such an anomaly to Congress."

To avoid this anomaly the majority holds, erroneously, we respectfully submit, that by the disjunctive phrase "or answers in writing to specific questions" in §6(b) of the F.T.C. Act Congress was merely explicating what the Commission might require of a corporation in an annual or special report. The error arises from the failure to observe that §2(b) of the Administrative Procedure Act (5 U.S.C. §1001(b)) defines the word "person" to include "individuals, partnerships, corporations . . .". Thus, where, as here, the District Court invoked the provisions of §6(c) of the Administrative Procedure Act, giving due consideration to the definition of "person" as well as other provisions of that section, it follows that the orders of a District Court made under such section are subject to the penalty for contempt both in the case of a corporation and an individual.

It also is to be noted that where a requirement to produce documents is enforced pursuant to §9 of the F.T.C. Act (and not §6(c) of the Administrative Procedure Act), the fine and imprisonment provisions mentioned above are held to apply to corporations as well as to individuals, *Federal Trade Commission* v. *Millers' Nat. Federation*, 23 F. 2d 968, 971 (D. C. Cir., 1927).

trative Procedure Act, as appears from the statute and the legislative history. The House Report[2] stated:

> "• • • The Section [6(c)] expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any form of penalty for non-compliance."

The Senate Judiciary Committee in its Committee Print of June 1945[3] stated:

> "• • • Subsection (c) is designed to • • • recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The 'haphazard' and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415)."

The foregoing legislative history was quoted in our briefs in the Court of Appeals and in this Court. The majority opinion has made no reference to such history. The briefs of the United States made no attempt to contradict or overcome that legislative history.

The majority opinion appears to be the first decision of this Court which interprets Section 6(c) of the Administrative Procedure Act. The opinion conflicts with a long standing rule of this Court, stated prior to the enactment of the Administrative Procedure Act, that the recipient of an administrative agency subpoena may contest in good

---

[2] H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) reproduced in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong. 2d Sess. (1946), at p. 265.

[3] Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess. (1946), p. 27.

faith the lawfulness of the subpoena without fear of penalty unless such recipient fails to obey the court order of enforcement.[4]

In the dissenting opinion in *Penfield Co.* v. *S.E.C.*, 330 U. S. 585, 603 (1947), Mr. Justice Frankfurter wrote:

> "Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance. Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforce-

---

[4] In considering question No. 5 on this review, whether the imposition of forfeitures deprives petitioner of property without due process, the majority opinion stated, at pages 16 and 17:

> "We need not consider this point at length for it appears that petitioner did not try to obtain judicial review prior to the commencement of this action by the government, nor did petitioner seek a stay once the litigation had begun. This inaction was in part based upon petitioner's reliance on *Federal Trade Comm'n* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). This reliance was misplaced."

The majority opinion has overlooked or disregarded that it was the General Counsel of the Commission who, in part at least, induced such reliance. Moreover, *Claire Furnace* has not previously been overruled by this Court. On August 31, 1959, petitioner's counsel wrote the Commission's General Counsel requesting whether the members of the Commission would be willing to submit to the jurisdiction of the Court [United States District Court for the Southern District of New York] in a suit instituted by our client [St. Regis] against the Commission for declaratory judgment and injunctive

ment. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; 155 U. S. 3. Accordingly, an order directing obedience to a subpoena by the Securities and Exchange Commission, like a subpoena of any other federal agency, does not issue as a matter of course. An administrative subpoena may be contested on the ground that it exceeds the bounds set by the Fourth Amendment against unreasonable search and seizure; that the inquiry is outside the scope of the authority delegated to the agency; that the testimony sought to be elicited is irrelevant to the subject matter of the inquiry; that the person to whom it is directed cannot be held responsible for the production of the papers. See *Interstate Commerce Commission* v. *Brimson*, *supra*, at 479 and 489; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298; *Oklahoma Press Pub-*

---

relief (R. 200). On September 4, 1959 the General Counsel replied (R. 200, Ex. 113 to Ct. Ex. 1), stating:

> "In the event such suit should be filed, you are advised that we would be compelled to note the probable lack of jurisdiction in the Court upon the authority of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). . . ."

The District Court also found (R. 204) that petitioner's prior applications to the Commission to modify the Commission's orders were "reasonable efforts before the Commission itself to obtain reasonable conditions . . ." (Citing *U. S.* v. *Morton Salt*, 338 U. S. 632 at p. 653.)

lishing Co. v. *Walling*, 327 U. S. 186. And see Lilienthal, *The Power to Compel Testimony*, 39 Harv. L. Rev. 694."

In *ICC* v. *Brimson*, *supra*, this Court, by Mr. Justice Harlan, said at page 489:

> "• • • in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court."

The majority opinion of this Court has overturned a fundamental policy of the law applicable to government administrative agencies which found legislative approval in §6(c) of the Administrative Procedure Act. There Congress extended the policy, previously applicable to an agency "subpena", to include an agency's "similar process or demand". The majority opinion, having held that the Commission's questions are enforceable under §6(c), should logically have concluded that the only penalty to which petitioner is subject is the "penalty for contempt in case of contumacious failure [of petitioner] to comply" with the District Court's order and judgment.

Second

The majority opinion overlooks the fact that under the Census Act[5] Congress granted powers to a government department to "determine" forms of reports. Since the enactment of the statute the Census Bureau of the Commerce Department has consistently construed such power

[5] 68 Stat. 1013 (1954), 13 U.S.C. §5 (1958).

to include a requirement that the reporting corporation keep a retained copy of such report in the files of the reporting corporation and which would not be subject to any use by the government for "investigative" purposes. Such long continued practice and construction of the statute by the government department in charge thereof and in the performance of its functions under the statute should be accorded great weight in any judicial interpretation of the department's powers, *Alaska Steamship Co. v. U. S.*, 290 U. S. 256, 262 (1933).

For the reasons stated, rehearing should be granted as requested herein.

The undersigned hereby certifies, pursuant to Rule 58 of the Supreme Court Rules, that the foregoing petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

(signed) HORACE R. LAMB

.....

Attorney for Petitioner.

December 29, 1961.

LIBRARY
SUPREME COURT, U. S.

MOTION FILED JAN 26 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MOTION OF PETITIONER TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

HORACE R. LAMB,
Attorney for Petitioner,
One Chase Manhattan Plaza,
New York, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MOTION OF PETITIONER TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

Petitioner St. Regis Paper Company respectfully moves the Court for an order of this Court recalling, and on such recall, amending or correcting the judgment of this Court herein, dated December 11, 1961 (although actually received in the office of the Clerk of the United States District Court for the Southern District of New York on January 19, 1962), so that, as so amended or corrected, the said judgment of this Court shall direct that in the determination of the number of days for which petitioner shall forfeit to respondent the sum of $100 (pursuant to the provisions of the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act, 38 Stat. 723 (1914), 15 U.S.C. §59 (1958)) for each day of "failure"